87-783



No.

IN THE

**SUPREME COURT OF THE UNITED STATES**

October Term, 1987

**CORDOVA CLAY COMPANY, INC.**

Petitioner,

vs.

**UNITED STATES OF AMERICA,**

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

# PETITION FOR WRIT OF CERTIORARI

John E. Medaris
Attorney for Petitioner
Suite 205 Shelby Medical Center
P.O. Box 766
Alabaster, Alabama 35007
(205) 663-1581

## QUESTIONS PRESENTED

1. Whether the Eleventh Circuit Court of Appeals finding that Cordova Clay Company, Inc. was not exempt from reclamation fees under 30 U.S.C. Section 1291(28) was erroneous and violative with the legislative intent in plain wording of this Act.

## PARTIES TO THE PROCEEDING

I. COUNSEL FOR DEFENDANT/PETITIONER/ CORDOVA CLAY COMPANY, INC.

John E. Medaris

II. DEFENDANT/PETITIONER

Cordova Clay Company, Inc.

III. COUNSEL FOR ORIGINAL PLAINTIFF/ UNITED STATES OF AMERICA

On behalf of the United States Department of the Interior

Stuart Sanderson, Department of the Interior

Angie O'Connell, Department of the Interior

David I.C. Thomason, Attorney Department of Justice

F. Henry Habicht, II, Assistant Attorney General

Frank Donaldson, U.S. Attorney for the Northern District of Alabama

Robert S. More, & Richard E. O'Neal, Assistant U.S. Attorneys

IV. ORIGINAL PLAINTIFF AND RELATED PARTIES

United States of America on behalf of the United States Department of the Interior

V. STATEMENT OF RELATED PARTIES OR ENTITIES

Beaird Coal Company, Inc., Party at the trial level, not a Party under this Writ.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Cases: Page

No.

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# PETITION FOR WRIT OF CERTIORARI

The petitioner, Cordova Clay Company, Inc., respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on August 6, 1987.

## OPINIONS BELOW

The opinion of the Court of Appeals on original deliverance is reported and is not published. The Court's original opinion is attached hereto as Appendix A. The District's Court's opinion is attached hereto as Appendix B.

## JURISDICTION

The opinion of the Court of Appeals was entered on August 6, 1987. This Petition for Writ of Certiorari was filed

with this Court within Ninety (90) days provided for by 28 U.S.C. Section 2101(c). This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

## STATUTORY PROVISION INVOLVED

1. The Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. Section 1201, et seq.

The applicable portion of said Act is entitled, "Administrative and Miscellaneous Provision," Section 1291(28), "Surface coal mining operations" means --

"(A) activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of section 516 <30 USCS Section 1266> surface operations and surface impacts incident to an

underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine site: Provided, however, That such activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 2/3 per centum of the tonnage of

minerals removed for purposes of commercial use or sale or coal explorations subject to section 512 of this Act <30 USCS Section 1262>; and

(B) the areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage, and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing

areas, shipping areas and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities; ..."

## STATEMENT OF CASE

This case arises out of Cordova Clay Company, Inc.'s mining operations during the period of June 1, 1980 through June 30, 1982. The United States by and through the Department of Interior and the Office of Surface Mining, audited Cordova Clay Company, Inc. pursuant to the Surface Mining Control and Reclamation Act for the purposes of establishing the amount, if any, due for reclamation fees, under 30 U.S.C. Section 1201, 1232(a). Cordova Clay Company, Inc. denied owing reclamation fees because of

the exemption found in the definition of "surface coal mining operations" as set forth in 30 U.S.C. Section 1291(28).

Cordova Clay Company, Inc. successfully contented at trial that it owed no reclamation fees since the proportion of coal to other minerals did not exceed the statutory exemption (16 2/3) of 30 U.S.C. 1291(28). That based upon this finding the trial court held that Cordova Clay Company, Inc. owed no reclamation fees since the proporation of coal to other minerals mined did not exceed the statutory exemption. Appendix B - Page 38 and 39.

The United States appealed and the Eleventh Circuit Court of Appeals, reversed and rendered, finding that the Courts factual determination was inconsistant with its previous

interpretation of the relevant statute. Appendix A - Pages 2 - 3, hence this Writ.

**REASONS FOR GRANTING THE WRIT**

Cordova Clay Company, Inc.'s contention that the Eleventh Circuit Court of Appeals erred in its reversing and rendering findings by the District Trial Court. The standard for determining amounts of coal and other minerals mined to meet the requirements of 30 U.S.C. Section 1291(28) should be determined in accordance with the plain wording of the statute.

That statute provides that the Surface Mining Control and Reclamation Act of 1977 does not apply to mining operation if "the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16

2/3 per centum of the tonnage of minerals removed for purposes of commercial use of sale...."

The District Court and the Court of Appeals both found that Cordova Clay Company, Inc. was a legitimate clay and shale mining operation.

The District Court and the Court of Appeals have noted that there is a void of any interpretation of this statute either by legislature or through case law. To the extent that this effects parties similarly situated to Cordova Clay Company, Inc., the Court of Appeals decision precipitate a harmful and unintended enforcement of the Surface Mining Control and Reclamation Act of 1977.

Cordova Clay Company, Inc. contends that throughout its Appeal and throughout

the District Court level, it was in compliance with the 16 2/3 exemption. That this compliance would not necessarily be on a day by day basis, but on an overall basis.

That the auditors for the Department of Interior in reviewing the coal and mineral records of Cordova Clay Company, Inc. did not take into consideration inventory stockpile or location source of minerals. Appendix C.

In construing this testimony with the Court of Appeals decision, it is apparent to Cordova Clay Company, Inc., the Court of Appeals only considered minerals sold or shipped and did not take into account said inventory. The District Court considered the inventory in determining compliance with the 16 2/3 exemption.

In that the Act provides that the "extraction of coal" is the standard (not the sale of coal) that the Court of Appeals decision appears to be based upon sales figures and royalty figures and does not consider those minerals mined which would also mean mineral stockpiles from the mining operation. Cordova Clay Company, Inc. requests this Court to note that the Court of Appeals relied upon Davis, the government auditor, who prepared the governments report for determination of coal mined in relation to other minerals, who stated that he relied upon the defendants mineral distribution ledger in determining the tons of clay and shale shipped to each of the Cordova Clay customers. Appendix C.

That the standard is not for shipping but the extraction. The Court also notes that possibly Davis, the government auditor, misunderstood certain questions, misadded figures and at the same time they rely on his shipment figures as a determination of what the clay and shale ratio was to coal and other mineral ratio. Appendix C

It is Cordova Clay Company, Inc.'s intention that the judgment entered by the Court of Appeals is erroneous and misleading and can lead to misinterpretation of the statute. It is Cordova Clay Company, Inc.'s contention that the Court of Appeals relied upon the government auditor, Davis' records of shipment and sales and ignored the auditors further statements that he did not examine inventory or stockpiles of any minerals.

## CONCLUSION

Cordova Clay Company, Inc. presents a simple argument. The Courts have never reviewed or interpreted the 16 2/3 exemption in 30 U.S.C. 1291(28).

Cordova Clay Company, Inc. claims that the Trial Court ruled properly, granting Cordova Clay Company, Inc. an exemption based upon coal extracted in relation to other minerals. Cordova Clay Company, Inc. claims the Court of Appeals excluded inventoried and stockpile minerals and only relied upon audited figures of sales and shipping records.

This Court should consider this Writ to enforce the legislatures plain meaning of the 16 2/3 exemption, of 30 U.S.C. 1291(28) requiring consideration of only minerals extracted - not minerals sold or shipped.

RESPECTFULLY SUBMITTED,

John E. Medaris
Attorney for Defendant
P.O. Box 766
Alabaster, Alabama 35007
Phone: (205) 663-1581

**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the above and foregoing pleading upon the following attorneys of record by placing a copy of same in the U.S. Mail, postage prepaid, on this the 4th day of November, 1987.

Stuart Sanderson
Department of the Interior
Washington, D.C. 20530

Angie O'Connell
Department of the Interior
Washington, D.C. 20530

David I.C. Thomason
Attorney, Department of Justice
Washington, D.C. 20530

F. Henry Habicht, II
Assistant Attorney General

Robert S. More
Richard E. O'Neal
U.S. Department of the Interior
P.O. Box 150065
Knoxville, Tennessee 37901

Frank W. Donaldson
U.S. Department of the Interior
P.O. Box 150065
Knoxville, Tennessee 37901

OF COUNSEL

# APPENDICES

**APPENDIX A**

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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NO. 86-7402

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UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

BEAIRD COAL COMPANY, INC., and CORDOVA CLAY COMPANY, INC.,

Defendants-Appellees.

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Appeal from the United States District Court for the Northern District of Alabama

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(August 6, 1987)

Before TJOFLAT and ANDERSON, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

The United States brought this action in the United States District Court for the Northern District of Alabama against the defendants Beaird Coal Company (Beaird Coal) and Cordova Clay Company (Cordova Clay) seeking reclamation fees on coal extracted by the defendants' mining operations in Walker County, Alabama during the first quarter of 1979 through the second quarter of 1982. Following a bench trial, the district court entered judgment against Beaird Coal for reclamation fees, interest and penalties.1 The court also held that Cordova Clay owed no reclamation fees since the proportion of coal to other minerals mined did not exceed the statutory exemption. Finding

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1The judgment against Beaird Coal is not challenged on appeal.

the court's factual determination inconsistent with its previous interpretation of the relevant statute, we reverse.

The Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201, et. seq. (SMCRA), requires the Secretary of the Interior to establish an "Abandoned Mine Reclamatin Fund," 30 U.S.C. Section 1231 (Fund), for the restoration of lands ravaged by past coal mining activity. The Fund is financed by a reclamation fee assessed on each ton of coal produced by current surface or underground coal mining operations. 30 U.S.C. Section 1232(a). The statutory definition of "surface coal mining operations" contained in 30 U.S.C. Section 1291 (28) provides a de minimus exception for coal extracted incidentally

to the mining of other minerals. That section provides in pertinent part:

> provided, however, that such activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16-2/3rds per centum of the tonnage of minerals removed for purposes of commercial use of sale ....

Therefore, a mining operation may avoid the payment of any reclamation fee by proving that the coal produced is less than or equal to 16-2/3rds per cent of the total mineral tonnage extracted. Once the tonnage of coal exceeds that percentage, however, the reclamation fee required by Section 1232(a) is due for every ton of coal removed.

The controversy in the district court revolved around the applicability of this exemption to the coal mining operations conducted by Cordova Clay. The facts presented at the trial were largely without dispute. Gail Beaird, president

of both defendant corporations, testified to the long history of his family's involvement in the Alabama clay business. Beaird joined the family company in 1959 and Cordova Clay has since grown into one of the most prominent suppliers of clay and shale in the southeast.

Beaird also testified that the terrain in Alabama where he mines clay and shale is interlaced with seams of coal. This coal is extracted along with the other minerals and sold on the spot market. In 1975, Beaird decided to incorporate his operations separately because of the high labor costs associated with coal mining. Beaird Coal employed union workers to mine coal while Cordova Clay's non-union workers extracted clay. In 1980, Beaird dissolved Beaird Coal due to unprofitability and

Cordova Clay continued the mining of coal, clay, and shale.

During the time period covered by this litigation, Cordova Clay conducted mining activities at two main sites in Walker County. The Argo pit to the east of Mulberry Fork of the Warrior River provided the source of all coal extracted by the company. Clay and shale were mined at Argo and also at the Riceton pit on the west side of the river, some three miles distant. The clay mined Argo differs in its physical properties from the clay extracted from the Riceton pit. Argo clay is more suitable for face brick while Riceton clay, which has a lower sand content, is used in the manufacture of refractory brick. Beaird stated that many of his customers require clay from either one side of the river or the

other. Therefore, Cordova Clay could not meet its buyers' demands without clay from both mineral sites.

Before the trial, the parties stipulated as to the tonnage of coal mined by Cordova Clay at the Argo site during the calendar quarters covered by this litigation. It was further agreed that the tonnage of clay and shale mined at Argo and Riceton corresponded to that contained in the defendants' answer to the government interrogatories. Apparently, the parties selected this set of figures because it divided the tonnage of clay and shale produced according to the origin of the minerals at either Argo or Riceton. Whether or not the clay and shale from the west side of the river could be aggregated with the Argo minerals for purposes of computing the

exemption was a major dispute at trial.

Despite the stipulation, the district court permitted the defendants to introduce different production figures through the testimony of Beaird and the government's auditor, Jessie Ray Davis. Davis testified about two audit reports, introduced into evidence, prepared by him from the records of Cordova Clay. Defendants' Exhibit 2 provides a breakdown of the clay and shale shipped to each of Cordova Clay's individual customers during the relevant quarters. Exhibit 4 compares the tonnages of coal, clay and shale on which Cordova Clay paid mineral royalties during that time period. Neither document indicates the source of the minerals.

Following the hearing, the district court issued a well reasoned order

resolving several issues of first impression concerning the interpretation of the 16-2/3rds exemption. Most important, the court expressly held that Cordova Clay could not aggregate the clay and shale produced at Riceton where no coal was extracted, with the clay and shale taken from the coal producing Argo pit. In the absence of relevant precedent or illuminative legislative history, the court relied on common sense in reaching this conclusion. The court noted that the single operation method urged by the defendants could result in anamolous applications of the reclamation fee statute:

> Mr. Beaird's approach in an extreme case could lead to a conclusion that a strip mine from which nothing but coal is mined is exempt because it is conducted in coordination with another mine several miles distant where a different mineral is extracted.

Therefore, the court held that "all of the pits to the east of the river ... constituted a single operation, but that within the meaning of the exemption the Riceton pit on the other side of the river constituted a separate operation."

The court found that Cordova Clay extracted 73,770.86 tons of coal during the pertinent calendar quarters as stipulated.2 With respect to the amount of clay and shale produced, however, the court noted a "troublesome inconsistency" in the stipulated tonnages and therefore credited the auditor's figures introduced at trial. Without stating the total clay and shale tonnage or otherwise evidencing

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2The parties did not stipulate as to the tonnage of coal extracted from Argo during the fourth quarter of 1981. The district court credited the defendant's figures for this time period.

the relevant calculations, the district court held that Cordova Clay met the 16-2/3rds per cent exemption. Thus, the defendant owed no reclamation fee on the coal extracted.

On appeal, the government argues that the ruling of the district court directed to the liability of Cordova Clay is fatally inconsistent. Since the clay and shale extracted at Riceton could not be aggregated with the Argo minerals in computing the exemption, the government contends that the district court committed clear error in relying on the audit reports since neither distinquished the minerals according to their source. Cordova Clay concedes that if the minerals from the two pits may not be combined as a matter of law, the court's factual finding that the company met the

exemption based on the mineral production at Argo is erroneous.

Although the defendants did not file a cross-appeal, we must give consideration to whether, as a matter of statutory interpretation, the district court erred in refusing to aggregate the mineral output from both sites for purposes of the exemption. See Greenwood Utilities Commission v. Hodel, 764 F.2d 1459, 1465 (11th Cir. 1985) (Court of Appeals may affirm district court for any reason supported by law despite lack of cross-appeal). As the district court noted, there is a complete dearth of case law, agency regulation, or legislative history which might provide a key to construing the somewhat cryptic language

of the 16-2/3rds per cent exemption.3 In the absence of any evidence of congressional intent to the contrary, we endorse the trial court's logically sound mine-by-mine approach as the best means of effectuating the broad remedial purposes of SMCRA.

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3Cordova Clay urges that we apply the rationale of two-acre exemption from the requirements of SMCRA provided in 30 U.S.C. Section 1278(2) (1986). The regulation promulgated pursuant to that statute exempts commercial coal extraction operations where the "surface coal mining and reclamation operation, together with any related operations, has or will have an affected area of two acres or less." 30 C.F.R. Section 700.11(b) (1986). Mining operations are deemed related if drainage from both flows into the same watershed within five aerial miles of either operation or if the operations are under common ownership or control. While these sweeping regulatory definitions serve to narrow the two-acre exemption, engrafting these precepts onto the 16-2/3rds per cent exemption would have the opposite effect. We decline to extend the 16-2/3rds per cent exemption so far.

By affirming this interpretation of the statute, we are forced to conclude that the court based its calculations on incorrect figures. After a painstaking examination of the record, it is clear that the trial judge relied upon the audit figures contained in Defendant's Exhibit 2, a breakdown of the total tonnage of clay and shale shipped to the customers of Cordova Clay during the significant time period. We base this conclusion in large part upon a footnote in the court's order stating that the audit figures utilized by the court correspond to the figures relied upon by the defendant at the trial except for the last two quarters which were misread by the defendants. The record indicates that the auditor and defendants' counsel did indeed total the incorrect column of

figures for the last two relevant calendar quarters when discussing Exhibit 2 at the trial.

The record indicates that the figures contained in Exhibit 2 relating to the clay and shale shipped to Cordova Clay's customers must necessarily have included clay and shale extracted at Riceton. A representative of General Shale, one of the defendant's largest consumers listed on the audit report, testified at the trial that the clay extracted from the Argo pits did not meet the needs of his company. Davis, the government auditor who prepared the report, stated that he relied upon the defendant's mineral distribution ledger in determining the tons of clay and shale shipped to each of Cordova Clay's customers. Several times during the

hearing, Davis claimed that he did not consider whether the minerals reflected in the ledger had been extracted from different sites.4 This evidence mandates

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4The district court may have been inadvertently misled by Davis' response on cross-examination to the following question:

> Q. So if in order to fill a clay and shale order to Bickerstaff Clay or to General Shale, it was necessary for Mr. Beaird to extract clay and shale from a lease hold where coal was also extracted and yet it was also necessary for them to go to another site where there was not coal, you considered for in your purposes only the extraction of the site where the coal was located?
>
> A. Yes, sir.

Although Davis responded affirmatively, the auditor's other responses indicate that he misunderstood the question. Davis asserts repeatedly that he did not consider whether the figures in the mineral distribution ledger came from a single or multiple sites. Viewing the record as a whole, we are left with "a definite and firm conviction that a mistake has been committed." Lincoln v. Board of Regents of University System of Georgia, 697 F.2d 928 (11th Cir.), cert. denied, 464 U.S. 826, 104 S.Ct. 97, 78 L.Ed.2d 102 (1983).

a determination that the district court erroneously relied upon figures which included the minerals produced at Riceton despite an earlier interpretation of the exemption forbidding aggregation of the output of the two mines.

In light of Cordova Clay's candid admission that the company cannot meet the statutory exemption without including the minerals produced at Riceton, a remand in this case for a correct calculation of the clay and shale produced at the Argo mine would constitute a mere intellectual exercise. In the interests of judicial economy, we reverse the factual finding of the district court that Cordova Clay is exempt from reclamation fees on the coal extracted by surface mining and render judgment for the government in the amount

of $25,819.80 plus applicable pre-judgment interest and late payment penalties.5

REVERSED AND RENDERED.

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5This figure is the product of the 73,770.86 tons of coal produced by Cordova Clay at the Argo site during the relevant period times the 35-cent reclamation fee assessed on each ton of coal extracted by strip mining in accordance with 30 U.S.C. Section 1232(a).

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
JASPER DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
| Plaintiff, | ) | |
| v. | ) | CIVIL ACTION NO. |
| BEAIRD COAL COMPANY, INC. and CORDOVA CLAY COMPANY INC., | ) | CV 84 V-0850-J |
| Defendants. | ) | |

**OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**OPINION**

I.

Plaintiff United States of America sued defendants for reclamation fees, interest and penalties under 30 U.S.C. Section 1232(a) in connection with various amounts of coal produced by defendants from the first quarter of 1979 through the second quarter of 1982. Plaintiff also claims an $1100 civil penalty which was finally imposed by the Office of Surface

Mining Reclamation and Enforcement in January 1980 in connection with a violation for which defendant Beaird Coal Company, Inc. (Beaird Coal) was cited in 1979.

Defendants deny owing the reclamation fees because of the exemption found in the definition of surface coal mining operations in 30 U.S.C. Section 1291(28) to the effect that such operations "do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 2/3 per centum of the tonnage of minerals removed for the purposes of commercial use or sale ...."

There is almost no case law on the meaning and operation of the exemption. We are cited to only two cases, both of which involved defendant Cordova Clay Company,

Inc. (Cordova Clay).1 The first is a case decided by the Alabama Court of Civil Appeals, Alabama Surface Mining Reclamation Commission v. Cordova Clay Co., , 434 So. 2d 283 (Ala. Civ. App. 1983). The second is the appended decision of an administrative law judge in an administrative proceeding before the United States Department of the Interior styled Cordova Clay Co. v. Office of Surface Mining Reclamation & Enforcement, Docket No. NX 5-3-R. Plaintiff objects to consideration of both opinions -- both favored defendant -- arguing strenuously that they do not constitute legal precedent. They are considered by this court, however, to have as much persuasive effect as the power of their logic and

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1The Alabama state case cited in text also involved defendant Beaird Coal.

analysis justifies.

Most of the facts in the present case appear without dispute. Mr. Gail Beaird, the owner of both defendant corporations, has been in the clay and shale mining business for about 25 years. His father preceded him in that business by about 12 years and began working for his father as a teenager. He is now the most or at least one of the most prominent suppliers of clay and shale in this region. He supplies those products to manufacturers of brick, clay tile and clay pipe. Mr. Beaird's operation or operations during the period in question were in Walker County, Alabama, and included the Argo and Benoit pits east of the Warrior River in the Argo area and the Riceston pit west of the river near Cordova.

When Mr. Beaird began mining clay, before the period in question, he

extracted the clay from abandoned coal mines. In the Argo-Cordova area a 36 inch or more seam of marketable fire clay lies directly beneath a 36 to 60 inch seam of Mary Lee coal. Above the coal is 28 to 30 feet of blue shale, which has no present market, an 11 inch seam of New Castle coal, 18 to 25 feet of weathered shale, part of which has commercial value, and a thin layer of top soil. Mary Lee coal can be extracted by either deep mining or strip mining. After its extraction the fire clay is readily available. It is for this reason that Mr. Beaird followed the coal miners, extracting the clay after other mine operators had removed the Mary Lee.

In time, however, Mr. Beaird's supply of clay produced by such methods became inadequate. He acquired leases on which he

or his companies could conduct the entire operation necessary to extract the clay. Most of the lands covered by his leases had already been "mined out" by underground mines and the only remaining Mary Lee coal consisted of the pillars that were left in place to support the mine roof.

Both the Mary Lee coal and the New Castle coal are readily marketable. Although subject to market and price fluctuations they were sold during the period in question for prices around $25 a ton while fire clay was selling for $6 a ton or a little more and shale was worth about $3.25 a ton.

Before the first quarter of 1979 Mr. Beaird incorporated Beaird Coal as an entity to contract with the United Mine Workers. His operation then included

removal of the coal and shale above the clay as well as the clay itself. As it is difficult in Walker County to mine coal without a union contract, Beaird Coal was formed to be the contracting party. According to Mr. Beaird, however, the operation of Beaird Coal proved to be unprofitable because of the union wage scale. He therefore shut it down at the end of May 1980 and returned to his prior status as a non-union operator through his other corporation, Cordova Clay. For purposes of this case only, Cordova Clay agrees that it is liable for any obligation of Beaird Coal.

II.

This case turns primarily on four questions:

(1) In the context of this case, what are the geographical limits of an "operation" within the meaning of 30 U.S.C. Section 1291(28)?

(2) Over what period of time is the 16 2/3 percent limit provided in 30 U.S.C. Section 1291(28) to be computed?

(3) Does the word "incidental" in that section involve considerations other than the 16 2/3 percent and, if so, what are they and how do they operate in this case?

(4) Should defendant's stockpile or inventory of shale be counted in the mathematical computation?

The fourth question is primarily an issue of fact. The first three, however, involve construction of the statute. The language provides no answer to the questions and there is a paucity of information concerning the legislative intent as it bears on these issues now before this court. For the most part the court is called on to make an intelligent guess concerning what Congress would have thought if it had thought about something

it probably didn't think about. Because a decision must be made, however, and armed primarily with its own notion of common sense, the court will apply its reading of the statute to the facts before it.

(1)

Mr. Beaird insists that his mining activity, both east and west of the river, constituted a single operation for purposes of the exemption. He points to the fact that his customers' requirements included clay from both sides. In extracting the minerals he operated for all purposes as a single entity, using only one set of machinery and one work force, and affecting a single watershed. The court recognizes that from Mr. Beaird's point of view this single operation concept is entirely reasonable. It is not nearly so reasonable, however,

from the point of view of a court attempting to apply a reclamation statute. Mr. Beaird's approach in an extreme case could lead to a conclusion that a strip pit from which nothing but coal is mined is exempt because it is conducted in coordination with another mine several miles distant where a different mineral is extracted.

Mr. Beaird's Argo and Cordova operations are more than three miles apart as the crow flies. By road the distance is much farther. His coal extraction was from the Argo location. The court is reasonably satisfied that all of the pits to the east of the river were essentially one continuous pit and constituted a single operation, but that within the meaning of the exemption the Riceton pit on the other side of the river constituted a separate operation.

At about the end of this audit period the Office of Surface Mining issued regulations establishing a specific timeframe of "twelve consecutive calendar months" for application of the exemption. 30 C.F.R. Section 870.11(d). With this rule OSM did not purport to be interpreting the statute. Rather, it was an express exercise of the Secretary's authority to implement the statute. See 47 Fed. Reg. 28,577 (1982). The comment suggests that the only alternative is a quarterly determination. Id. The court does not perceive that this proposed new rule is entitled to retroactive application and disagrees that a quarterly determination is the only alternative. Defendants urge that the entire audit period be considered, and it is equally

reasonable that a calendar year might be used. Attributing to the statute a choice between these alternatives is not necessary, however, because this court's result would be the same regardless of whether the time frame is a rolling four quarter period (treating fractional quarters as full quarters),2 a calendar year, the entire audit period, or the total production of each defendant considered separately. It is only if individual calendar quarters are used that any difference in result is achieved. Because minerals are extracted from a

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2This court could not compute the percentage of coal extracted for all twelve month periods because only quarterly production figures are in evidence. Neither Cordova Clay nor Beaird Coal exceeded the 16 2/3 percent threshold for any four consecutive quarters, nor was the threshold exceeded for any four-quarter period during which both companies were operating.

strip mine layer by layer a short timeframe would tend to produce extreme variations, a result that is less reasonable in the court's view than any of the other alternatives.

(3)

The plaintiff argues that extraction of coal by the defendants was too important financially to be merely incidental to its clay and shale extraction activities. In the appended decision, the administrative law judge rejected the same argument for a monetary impact test. He pointed to the meager legislative history of a comparable predecessor proposal for the statement that the exception is designed to exclude operations "where coal is found but is not the mineral being sought." S. Rep. No. 28, 94th Cong., 1st Sess (1975)(emphasis

added). This court agrees that this statement, which is also found in the legislative history of the Senate version of the bill actually adopted., See S. Rep. No. 128, 95th Cong., 1st Sess. 98 (1977), is a more reasonable explanation of the "incidental" requirement than an absolute monetary limitation would be. The latter would have been quite easy for Congress to formulate if it had been intended. We therefore hesitate to assume it was intended in the absence of such a formulation.

The court is reasonably satisfied that Cordova Clay's mining activities primarily sought clay and shale. Beaird Coal, however, was incorporated for the purpose of mining coal and did so through its life under a contract with the United Mine Workers that was entered into for the

mining of coal. It did not claim otherwise at the time of the audit. Indeed, at the conclusion of its first audit in December, 1979 it acknowledged liability for the reclamation fee and entered into an installment agreement for its payment. The plaintiff argues that inclusion of clay sales figures in the books of Beaird Coal is a sham. This is not an issue that the court must resolve, however, because the court is not reasonably satisfied that the mining of coal by that entity was incidental to its extraction of other mineral, even though its coal production did not exceed the 16 2/3 percent limit.

(4)

The inventory question is not free of difficulty. The court credits defendants' evidence that Cordova Clay's shale stockpiles are suitable for making brick,

clay tile and clay pipe and were maintained during the relevant period as inventory because of their commercial value. The court also credits the records maintained by defendant that reflect quantities. Plaintiff's criticism of defendants' lack of a verification procedure is not well taken. Defendant's practices conformed to the usual practices in the industry. In addition, plaintiff had ample opportunity to check the inventory quantities. It did not do so because at the time of its audits of defendants plaintiff's representative erroneously thought inventory to have no significance.

Except for the fourth quarter of 1981 for which the court credits defendant's figures and explanation, there seems to be no dispute as to coal production figures.

The evidence presents a troublesome inconsistency, however, in the clay and shale figures. The court credits the figures provided by plaintiff's auditor, Davis.3

III.

The government introduced evidence at trial showing that as of August 30, 1982, Beaird Coal owed $8156.47 in reclamation fees and $2392.82 in interest on those fees for the first, second and fourth quarters of 1979 and the first and second quarters of 1980. In addition, defendants

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3For all but two quarters these were the figures relied upon by defendants at trial. Upon this court's examination of Davis's audit sheets, which were introduced as evidence, it became clear that defendants and Davis had, at trial, misread the clay and shale figures for the first and second quarters of 1982. For those quarters, the court used the figures from the audit sheets.

acknowledged at trial that Beaird Coal mined 6929.78 tons of coal in the third quarter of 1979 for which the reclamation fee of $2425.42 also has not been paid. As of the end of August 1982 the interest owed on that unpaid fee was $848.90, making Beaird Coal's total liability as of that date $10,581.89 in fees and $3241.72 in interest.

Since then, 42 months and 10 days have passed, during which Beaird Coal's interest liability has increased at the rate of one percent a month, see 30 C.F.R. Section 870.15. It now stands at $7721.39. Since September of 1985, a late payment penalty of one-half percent per month has also been accumulating. See id. The penalty stands at $335.09.4

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4Defendants do not contest the method of computing interest and penalties used here.

To the extent that the foregoing contain factual statements they constitute findings of fact within the meaning of Fed. R. Civ. P. 52. In addition, the court makes the following specific findings.

**FINDINGS OF FACT**

1. On January 16, 1980 OSM issued a Final Order of Civil Penalty Assessment in the amount of $1,100 against Beaird Coal which has not been paid.

2. During all four quarters of 1979 and the first two quarters of 1980 Beaird Coal produced a total of 32,186.14 tons of coal by surface coal mining on which the reclamation fee of 35 cents per ton required by 30 U.S.C. Section 1232 has not been paid in full. The extraction of such coal was not incidental to the extraction of other minerals. The unpaid fee is $10,581.89.

3. During the last three quarters of 1980, all four quarters of 1981 and the first two quarters of 1982 Cordova Clay produced a total of 73,770.86 tons of coal by surface mining, but extraction of all of said coal was incidental to extraction of other minerals and the tonnage of said coal did not exceed 16 2/3 percent of the tonnage of minerals removed for purposes of commercial use or sale.

**CONCLUSIONS OF LAW**

1. This court has jurisdiction of this case under 30 U.S.C. Sections 1232(e) & 1268(d) and 28 U.S.C. Sections 1345 & 1355.

2. Beaird Coal owes to the plaintiff a penalty of $1,100 assessed under 30 U.S.C. Section 1268.

3. Beaird Coal owes to the plaintiff reclamation fees under 30 U.S.C. Section

1232 in the amount of $10,581.89 together with interest int he amount of $7721.39 and a penalty of $335.09 under 30 C.F.R. Section 870.15 for a total of $18,638.37.

4. Cordova Clay does not owe to the Plaintiff any reclamation fee on its own production during the suit period but is liable for amounts owed by Beaird Coal as set forth in Conclusions of Law 2 and 3, above.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
JASPER DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
| Plaintiff, | ) | |
| v. | ) | CIVIL ACTION NO. |
| BEAIRD COAL COMPANY, INC. and CORDOVA CLAY COMPANY INC., | ) | CV 84 V-0850-J |
| Defendants. | ) | |

**ORDER**

It is ORDERED that judgment be entered for the plaintiff and against defendants in the amount of $19,738.37 together with costs.

Done and Ordered this 10th day of March, 1986.

/s/ Robert S. Vance
United States Circuit Judge
Sitting by designation

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
JASPER DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
| Plaintiff, | ) | CASE NO. |
| v. | ) | CV 84-V-0850-J |
| BEAIRD COAL COMPANY, INC. and CORDOVA CLAY COMPANY, | ) | 2/18/86<br>10:00 A.M. |
| Defendants. | ) | Record for Appeal<br>The Honorable Robert S. Vance<br>Circuit Judge, Eleventh Circuit<br>United States Court of Appeals |

APPEARANCES:

| | |
|---|---|
| FOR THE PLAINTIFF: | MR. ROBERT S. MORE, AUSA<br>MR. RICHARD E. O'NEAL, AUSA<br>U.S. Department of the Interior<br>P.O. Box 150065<br>Knoxville, TN 37901 |
| FOR THE DEFENDANT: | MR. PHIL LAIRD<br>MR. HANK WILEY<br>Attorneys at Law<br>1816 Third Avenue<br>Suite C<br>Bankhead Byars Bldg.<br>Jasper, Alabama<br>35502-0498 |

## INDEX



**EVIDENCE ON BEHALF OF DEFENDANT**

A. The mineral distribution ledger, royalty statements, sub stock reports, I believe that's all I recall at this point in time. Oh, I looked at as far as other records are concerned, I looked at leases, contracts, I --that type of record.

Q. Okay. You did not examine any record relative to clay inventory, did you, sir?

A. Regarding clay inventory, no, clay shipped, yes.

Q. Okay. You did not review any records relative to shale inventory, did you, sir?

A. No, sir.

Q. Did you go out --you testified previously that you did not go out to the pits. Did you go out on any property of Beaird Coal and use any inventories of any clay or any shale that might be accumulated there?

A. No, sir.

Q. Okay. Now, what type of records did you review relative to clay and shale being shipped?

A. That was from your mineral distribution ledger.

Q. Okay. Now, this is not the only audit that you have conducted in this case, is it, Mr. Davis?

A. I did three quarters for Beaird Coal Company and the audit for Cordova Clay.

Q. Okay. Now, do you have with you, please, sir, your audit records of Cordova Clay Company?

A. I do not have.

PAGE 14

Q. Okay. Have you given those to counsel?

A. Counsel has all the records we have.

Q. If I give you -- furnish you with photostatic copies of your records of the Cordova Clay audit, would you recognize

those?

A. Yes.

THE CLERK. Defendant's Exhibit Number 2 marked for identification.

Q. Mr. Davis, if I may, please sir, let me ask you just to look at and familiarize yourself with the Defendant's Exhibit Number 2 and ask if you recognize that and I'll have the Clerk mark this on the chart. Have you had an opportunity to look at that?

A. Yes.

Q. Now, Mr. Davis, is that a part of the audit which you performed?

A. Yes, sir.

Q. Relative to Cordova Clay Company?

A. Cordova Clay, that's correct.

Q. And it is true, is it not, sir, that the audit period was actually I think it's just one month in the second quarter of '80 through the second quarter of '82?

A. Yes.

Q. Is that correct?

A. June 1980 through June of 1982.

PAGE 15

Q. Could you tell me what that exhibit is that you have in your hands there, please?

A. This is a summary of sales or shipment of shale and clay to the various companies.

Q. Okay. And those are the figures that you obtained as a result of the audit which you performed for Cordova Clay Company?

A. It's my review of the mineral distribution ledger.

Q. Now, when did you perform the audit of Cordova Clay Company?

A. I believe that was between October the 5th and October the 8th, 1982.

Q. And what type of records did you review

relative to this audit in addition to the mineral distribution ledger?

A. The royalty statement ledgers, severance tax reports, looked at the contracts, leases.

Q. Okay. Now, again, as with Beaird Coal Company, when you went to Cordova Clay Company, did you have what I think you've referred to as an opening conference or a beginning conference with Mr. Beaird or Mr. Garganus?

A. Yes.

Q. And they furnished you with all the records that you requested during that audit?

A. I believe so, yes.

PAGE 22

MR. WILEY: Judge, we would move to strike that as nonresponsive. I believe my question was if he ever considered shale

or clay in either one of these instances and I think the issue would invade the province of the Court.

THE COURT: Well, I don't know about that, but I think you can say just yes or no in answer to that particular question.

A. Would you restate the question, please.

Q. Of course. In neither one of these audits did you consider shale inventory or clay inventory?

A. No, although that's true, I did not.

Q. And as a matter of fact, in the Cordova Clay audit, a part of the records which you reviewed were mineral leases which were held by Cordova Clay; is that correct?

A. Yes.

Q. Okay. And in determining during your audit whether Mr. Beaird was entitled to the 16 and 2/3 exemption, you considered only clay and shale shipments that were

extracted from lease holds where coal was also extracted?

A. There was a final determination based on that, yes, sir.